Judicial and Legislative Attitudes Toward the Right to an Equal Education for the Handicapped

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Unlike many other animals, man does not abandon his handicapped offspring. Rather he shelters him, hopes for him, dreams for him, and loves him.[1]

The birth of a healthy baby holds for the parents a sense of victory and a vanquishing of fears. The birth of Merrit Beattie must not have been that for his parents. For little Merrit (or "Bud" as he came to be called) was born a victim of cerebral palsy, a handicapped child—the beginning of a confusing, guilt-ridden, hostile, sorrowful and frustrating experience for Bud and his parents. Characteristic of those who engendered such emotions, especially frustration, were the educators who were apologetic but helpless, so they claimed, because there was neither time, resources, nor room to handle a child like Bud.

Bud Beattie was born in a small town in northern Wisconsin in the spring of 1905. The brain damage was caused during delivery of the baby. Bud was more fortunate than other cerebral palsy victims because damage was only to the nervous system affecting his muscles, including his speech. There was no damage to that area of the brain responsible for thought or memory.

Little was known about cerebral palsy in 1905; the standard reaction to the inquiries of Bud's parents was to put the child in a "home" since he could never develop into a "normal" human being. Fortunately, Bud's aunt was a physician and sought for him the best medical care available at the time. In addition, the Beattie family was gifted with strength and foresight and made every effort to raise Bud as if he were a normal child. His father and grandfather built ramps and special paraphernalia to teach him to walk and to build up his muscular system. Therapy as a medical treatment was unheard of in those days, so the family assumed the responsibility.

Bud was a very bright child. He was taught to read and write at an early age. His writing was cumbersome and not easily read because of the limited muscle control in his fingers and hands. By the time Bud was eight years old, however, his writing had improved, and he had learned to use a special typewriter that his family had purchased for him. Bud was finally ready and eager to go to school.

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1. Roos, *Rights Litigation—A View from the Private Sector*, in THE RIGHTS OF THE MENTALLY HANDICAPPED: PROCEEDINGS FROM A BI-REGIONAL CONFERENCE 33 (Department of Health, Education and Welfare June 14-16, 1972). Dr. Roos was the Executive Director of the National Association for Retarded Children.

The school system accepted Bud as it would any other child. He was put in regular classes and responded well. His progress was very good, and there were no complaints registered by either his teachers or his fellow students. Bud, after all, was a likable child, and could not help the way he walked and talked or the facial contortions. His drooling was something the other children had learned to live with. Some of the children made fun of him, of course, and mimicked him, but Bud learned to handle the hardships because his family was supportive.

During this period of Bud's life he was encouraged by his family to do things other young boys did. He mowed lawns if the job was within his physical capabilities. He sold newspapers on the street corner, and after his father built him a special tricycle, he was able to peddle magazines on a regular route. He had a concession stand at the baseball park that his sisters helped him operate. Bud also sold Christmas trees and made deliveries to homes by pulling the tree on a sled. Bud was an ambitious boy.

In the fall of 1917 when Bud was ready to begin the sixth grade, the Superintendent of Schools notified the Beatties that their son would not be allowed to continue in school. There had been a complaint from a classmate that Bud's condition "bothered" her.[2] Bud's parents objected to this treatment, and in response, a special meeting of the Board of Education was called. At that meeting it was confirmed that Bud would not be allowed to continue his education in public school. The Beatties brought suit against the Board of Education in local court, and the jury rendered a decision to reinstate the child.

The defendant Board of Education appealed the case to the Wisconsin Supreme Court.[3] The supreme court, deciding the case in 1919, reversed and held that Bud Beattie could be excluded from public school because he had a negative effect on the teachers and school children. The court stated: "The right of a child of school age to attend the public schools of this state cannot be insisted upon when its presence therein is harmful to the *best interests of the school.* This, like other individual rights, must be subordinated to the general welfare."[4] The implication of the court was that an individual child's right to attend school is of less importance than the overall welfare of the staff and student body. Therefore, a handicapped child could either be placed in a special class or entirely excluded from public school, whichever was better for the system. Only the dissenting judge pointed out that there had been no evidence presented in the trial court that the boy's presence had a harmful effect.[5]

Bud's parents hired a private tutor for their son, but had to discontinue the lessons because of the expense. Therefore, Bud's formal

2. According to Beattie family sources, the complaint came from the daughter of the President of the Board of Education.

3. Beattie v. Bd. of Educ., 169 Wis. 231, 172 N.W. 153 (1919).

4. *Id.* at 233, 172 N.W. at 155 (emphasis added).

5. *Id.* at 236, 172 N.W. at 155.

training probably amounted to an eighth grade education. From that time on, he taught himself, with the help of his family. He was an avid reader, so he continued to learn.

Bud Beattie did not give up. He continued to be active in his community. One of his fondest accomplishments was initiating the Christmas decorations on Main Street. When his ideas expanded and he was not able to do the work himself, he turned the job over to the Chamber of Commerce.

Bud has been self-employed all of his life. He sold advertising for civic programs and other public affairs. He had customers as far as 150 miles from his home and traveled by bus or by train, or even hitchhiked to carry on his business. Sometimes that meant he walked ten to fifteen miles a day.

When Bud retired in 1966, compelled by deteriorating health, the City of Antigo Chamber of Commerce awarded him a lifetime membership for his many civic efforts over the years. It was the first time that organization had ever so honored one of its citizens. His city had finally recognized him.[6]

The Bud Beattie story and the Wisconsin Supreme Court's role in it are representative of both early social and judicial philosophy toward the treatment of exceptional children.[7] Those philosophies have changed over the years, but the changes have been slow.[8] This paper will explore the evolution of the right to an equal educational opportunity for the handicapped, its judicial and legislative recognition, and its present-day implementation.

As Stanley Herr points out: "Rights are generally exercised by the assertive. Legal systems do not often better themselves for those too inactive or infirm to protest fundamental deprivation."[9] Today, however, advocates for the rights of the handicapped, like those for many other groups deprived of their rights yet unable to defend themselves, have

6. Mr. Beattie is still living in Antigo, Wisconsin. The writer, also a native of Antigo, is well-acquainted with Mr. Beattie and his family. The details of Mr. Beattie's story were supplied from records the family had kept and personal recollections by Mr. Beattie and family members.

7. *See also* Watson v. City of Cambridge, 157 Mass. 561, 32 N.E. 864 (1893). The *Beattie* majority relied extensively on *Watson*, which, without regard for notions of due process, held that a local school district could expel a student who continued to exhibit disorderly conduct either voluntarily or by reason of imbecility. The *Watson* court, quoting from the school district's records, stated: "[H]e is so weak in mind as not to derive any marked benefit from instruction, and, further, . . . he is troublesome to other children. . . . He is also found unable to take ordinary, decent physical care of himself." 157 Mass. at 561, 32 N.E. at 864.

8. Very early treatment of the mentally retarded should be contrasted to the treatment at the time of the *Beattie* case.

> Until the last half of the 19th century, the retarded were commonly regarded as "feeble-minded" and treated accordingly. No differentiation was made between the retarded and the insane. Both, therefore, were locked in the same institutions, whether that was an asylum, a poorhouse or a house of correction. Many were forced out of the institutions by overcrowding, only to wander the streets and fend for themselves.

Comment, *The Least Restrictive Environment Section of the Education for All Handicapped Children Act of 1975: A Legislative History and An Analysis*, 13 GONZ. L. REV. 717, 743 (1978).

9. Herr, *Rights Into Action: Protecting Human Rights of the Mentally Handicapped*, 26 CATH. U.L. REV. 204 (1976).

served notice that this deprivation will no longer be tolerated.[10] It remains to be seen whether current remedies are effective toward eliminating past injustices.

I. JUDICIAL RECOGNITION OF A RIGHT TO EQUAL EDUCATION FOR THE HANDICAPPED

A. Brown v. Board of Education

The importance of the right to an equal education was first recognized by the United States Supreme Court in 1954 in *Brown v. Board of Education.*[11] The Court in *Brown* stated:

> Today, education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, *where the state has undertaken to provide it*, is a right which must be made available to all on equal terms.[12]

The holding of *Brown* was based on the concept of equality once the state had provided public education; the Court did not explicitly consider whether education was a constitutionally guaranteed right.

Therefore, any impetus for a guaranteed right to equal education had to come from state programs. Most state-mandated special education programs, however, had been monolithic in nature and designed for the educational needs of entire categories of handicapped children. As a result, those children with differing degrees of a particular handicapping condition and those with multiple handicaps were not adequately served. Educational programs were not designed to meet the special needs of individual children.[13] Educational placements made in many local education agencies were arbitrary and capricious, providing little explanation by the public schools of the educational justification for the placement. This condition prompted Dr. Sidney Marland, United States Commissioner of Education, to state in 1971 that six out of every ten handicapped children in America were not receiving special education services. Dr. Marland further stated:

> The right of a handicapped child to the special education needs is as basic to him as is the right of any other young citizen to an appropriate education in the public schools. It is unjust for our society to provide handicapped children

10. *See* Herr, *Retarded Children and the Law: Enforcing the Constitutional Rights of the Mentally Retarded,* 23 SYRACUSE L. REV. 995 (1972).

11. 347 U.S. 483 (1954).

12. *Id.* at 493 (emphasis added).

13. J. WILSON, THE RIGHTS OF ADOLESCENTS IN THE MENTAL HEALTH SYSTEM 156 (1978).

> with anything less than [the] full and equal education opportunity they need to reach their maximum potential and attain rewarding, satisfying lives.[14]

The concept of equal education for all children is especially applicable and compels attention in the case of the mentally retarded. Unlike many other handicapping conditions, mental retardation is a learning disability which by its very nature requires education as the therapy for the disability. Without special attention, the mentally retarded person might never learn. The past and present disastrous state of education for the mentally retarded emphasizes the need. In the vast majority of states the mentally retarded (as well as the mentally ill, physiologically impaired, and learning disabled) children have been routinely excluded from public schools either by operation of law or by administratively approved informal processes.[15] The statutory provisions have been in some cases so vague as to be legally suspect. For example, a Nevada statute authorized exclusion if the "child's physical or mental condition or attitude is such as to . . . render inadvisable his attendance at school."[16] Alaska permitted the exclusion of children with physical or mental conditions that rendered attendance impractical.[17] In addition to this specific statutory exclusion, states have classified handicapped children in ways that officially sanction exclusion. Children have traditionally been labeled "educable mentally retarded," "trainable mentally retarded," "emotionally disturbed," and other similar classifications. States have used these labels to exclude certain children or to "excuse" them from the public schools.[18] One major survey found that in 1971 only thirty-six percent of the country's retarded children were in educational programs of any kind.[19] Patterns for dealing with these "problem" children had developed. The "slow" child's parents were told to wait until a class small enough for their child was available. The parents of the "profoundly handicapped and mentally retarded" child were told that there were no suitable learning programs in the school system for their child. The parents were then left with the choice of institutionalizing the child, keeping the child at home despite a lack of adequate supervision, or providing for full-time, round-the-clock caretaking. The second "choice" was usually unrealistic, and the third "choice" exorbitantly expensive. Therefore, the decision—ultimately a foregone conclusion—was reluctantly to commit the child to a public institution.[20] One such institution's quality of care was challenged in *New York State Association for Retarded Children v. Rockefeller*,[21] and the conditions described in the opinion in

14. THE PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, THE MENTALLY RETARDED CITIZEN AND THE LAW 254 (1976).

15. A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 132 (1975).

16. NEV. REV. STAT. § 392.050 (1962).

17. ALASKA STAT. § 14.30.010 (1971).

18. Wilson, *supra* note 13, at 156.

19. Stone, *supra* note 15, at 132.

20. THE MENTALLY RETARDED CITIZEN AND THE LAW, *supra* note 14, at 253-54 (1976).

21. 357 F. Supp. 752 (E.D.N.Y. 1973).

that case have been summarized as "sorely overcrowded, underfunded and understaffed, improperly managed . . . barely suitable for physical survival, let alone habilitation and education."[22] The resulting strong association between mental retardation and institutions was one of the major impediments to educational reforms since it fostered the attitude that the mentally retarded were not able to learn and that they should therefore be institutionalized. The cycle was one of a self-fulfilling prophecy.[23]

B. *The* PARC *and* Mills *Decisions*

Although the Supreme Court stressed the importance of education in *Brown*, the special needs of the mentally retarded for education did not receive major attention until the first landmark case in this area of the law was decided in 1971. In that case, *Pennsylvania Association for Retarded Children v. Pennsylvania* [*PARC*],[24] a class action was filed on behalf of mentally retarded children who had been excluded from the public schools pursuant to a statutory scheme because they were "uneducable" or "unable to profit" from further school attendance. A three-judge federal district court panel approved a consent decree in which the parties agreed that all mentally retarded children are capable of benefiting from a program of education and training. The court noted that most mentally retarded children are capable of achieving self-sufficiency, and that the remainder are capable of achieving a lesser degree of self care.[25] The agreements reached were legal milestones. Because Pennsylvania recognized its responsibility to provide a free public education to all its children, it agreed to place each mentally retarded child in a "free, public program of education and training appropriate to the child's capacity."[26] To ensure such a result, the state agreed to have its Attorney General issue opinions to effectively foreclose use of the challenged statutes as exclusionary devices.[27]

A process of identification, evaluation, and placement was called for by the consent decree in *PARC*, following which an educational program was to be provided to each member of the class by a scheduled deadline.[28] In addition, *PARC* included some very significant due process safeguards: no mentally retarded child, or child believed to be mentally retarded, would be assigned or reassigned to either a regular or special education placement without notice and an opportunity for a due process hearing before a special hearing officer who was independent of the local school

22. THE MENTALLY RETARDED CITIZEN AND THE LAW, *supra* note 14, at 254.
23. Comment, *supra* note 8, at 743.
24. 334 F. Supp. 1257 (E.D. Pa. 1971).
25. *Id.* at 1259.
26. *Id.* at 1260.
27. *Id.* at 1260-66.
28. *Id.* at 1266-67.

district. Two mental retardation specialists were appointed by the court to review and approve the state's implementation plan.[29]

Other provisions of the decree were that the mentally retarded would be provided with preschool services equivalent to any established by the state for normal children, and that mentally retarded children would be eligible for private (home) education grants on the same basis as physically disabled children.[30]

It was of particular note that the court upheld its jurisdiction[31] against a constitutional claim under both the due process and equal protection clauses of the United States Constitution. To support the due process question, the court relied heavily upon the stigma that results from misplacement or exclusion resulting from the label of "mentally retarded."[32] Further, making reference to the *Brown* decision, the court stated that it had "serious doubt" whether, under equal protection analysis, mental retardation is a rational classification (as distinguished from a suspect classification) for the purposes of providing education.[33]

PARC resulted in a consent decree, and therefore constitutional questions were addressed but not decided. These questions were unequivocally settled in *Mills v. Board Of Education of the District of Columbia*,[34] and the principles enunciated in *PARC* relating to mentally retarded children were extended to all handicapped children.[35] In *Mills*, the district court was faced with a public school system in which advice, coercion, fabricated suspensions, delays in diagnosis, home assignments, and other means were employed and resulted in exclusion of children from the classroom. The court held that no handicapped child could be excluded from a regular public school assignment unless the child was provided adequate alternative educational services suited to the child's needs, a constitutionally adequate prior hearing, and periodic review of the child's status and progress. The District of Columbia was ordered to provide each child of school age "a free and suitable publicly-supported education regardless of the degree of the child's mental, physical or emotional disability or impairment."[36] A constitutional basis for the system's obligation was found in the principle stated in *Brown* that "where the state

29. *Id.* at 1266.

30. *Id.* at 1262-63.

31. Jurisdiction was challenged in a later proceeding by an intermediate school district that had dissented from the consent decree. A three-judge panel upheld the jurisdiction of the earlier panel. 343 F. Supp. 279 (E.D. Pa. 1972).

32. The court applied the reasoning of the United States Supreme Court in Wisconsin v. Constantineau, 400 U.S. 433 (1971), to the labeling of children: if "posting" an adult as a habitual drunkard required a prior hearing, branding a child "retarded" demanded no lesser safeguards. 343 F. Supp. 279, 295 (E.D. Pa. 1972).

33. 343 F. Supp. at 297.

34. 348 F. Supp. 866 (D.D.C. 1972).

35. *Id.* at 878.

36. *Id.*

has undertaken to provide [the opportunity of an education, that opportunity] is a right which must be made available to all on equal terms."[37] Therefore, according to the *Mills* court, the District of Columbia had violated the due process clause by denying handicapped children access to publicly-supported education.

Although neither *PARC* nor *Mills* was a full-scale trial on the merits,[38] these two decisions have been frequently treated as representing judicial recognition of the handicapped child's right to a public education.[39] The two decisions resulted in an array of similar cases in other jurisdictions. One of those suits is particularly noteworthy. In *Lebanks v. Spears*,[40] in which the plaintiffs were mentally retarded children, the court followed the reasoning of *PARC* and *Mills* but included two additional features in its order: the education provided had to be oriented toward the goal of making every child self-sufficient or employable; and educational opportunities had to be provided to mentally retarded adults who were not given educational services as children.[41] Other cases brought in the wake of *PARC* and *Mills* followed a different judicial pattern.[42] The courts in *Harrison v. Michigan*[43] and *Tidewater Society for Autistic Children v. Virginia*,[44] although nominally denying relief on *PARC*- and *Mills*-type claims, did so on the limited ground that the respective state legislatures had recognized the need for educating all handicapped children and had taken action to achieve that goal.

During this period of increased judicial activity on the equal right to education issue, the greatest efforts seemed to be devoted to the application of equal protection to the condition of handicapped children. Even after the *PARC* and *Mills* due process safeguards were enunciated, the exclusion of handicapped children continued and advocates thought it particularly desirable to invoke the strict scrutiny standard of equal

37. *Id.* at 875, *quoting* 347 U.S. 483, 493 (1954) (emphasis deleted).

38. In *PARC*, discussion of the constitutional claims was limited to a jurisdictional determination of the existence of colorable claims of constitutional violations, and in *Mills*, since the District of Columbia did not dispute its obligation to provide education for handicapped children but simply pleaded insufficient funds (a defense with which the court was not impressed), the court's discussion of equal protection was limited to a showing of the applicability of the principle to the denial of education for the handicapped.

39. *See* Herr, *Retarded Children and the Law: Enforcing the Constitutional Rights of the Mentally Retarded*, 23 SYRACUSE L. REV. 995, 1008 (1972); McClung, *"Do Handicapped Children Have a Legal Right to a Minimally Adequate Education?,"* 3 J.L. & EDUC. 153 (1974). *See also* H. R. REP. No. 332, 94th Cong., 1st Sess. 10 (1975).

40. 60 F.R.D. 135 (E.D. La. 1973).

41. *See also* Maryland Association for Retarded Children v. Maryland, Equity No. 100/182/77676 (Baltimore County Cir. Ct. April 9, 1974); *In re* G.H., A Child, 218 N.W.2d 441 (N.D. 1974). It is of particular interest that the latter case was decided after San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). *See* part I(c) *infra*.

42. Three patterns of judicial behavior in right to education decisions have been identified by at least one commentator. *See* Comment, *Rights of the Mentally Retarded*, 32 SW. L.J. 605, 617 (1978).

43. 350 F. Supp. 846 (E.D. Mich. 1972).

44. Civ. No. 426-72-N (E.D. Va. Dec. 26, 1972).

protection analysis because few discriminatory classifications can withstand that type of examination.[45] The argument has been made that handicapped children qualify as a "suspect" class because they are a vulnerable and stigmatized minority, lacking in political power and frequently subject to discrimination.[46] Therefore, it has been reasoned, the legislative classifications that caused the suspect "handicapped" category to be invoked should be subjected to strict scrutiny and overturned if found to constitute invidious discrimination.[47]

Advocates also espoused the other catalyst of strict scrutiny, "fundamental interests."[48] It was believed that the *Brown* Court's statement that "today education is perhaps the most important function of state and local governments"[49] was a firm enough foundation for the theory that education was either a constitutional right or at least a fundamental interest that could not be denied unless the state could display a compelling state interest for its denial.[50]

C. *The Impact of* Rodriguez

The hopes of equal education advocates were seriously shaken if not shattered by the Supreme Court's 1973 landmark decision in *San Antonio Independent School District v. Rodriguez*.[51] The Court rejected both strict scrutiny arguments and held instead that education per se was neither a constitutionally guaranteed right nor a fundamental interest. Justice Powell, speaking for a bare majority, found that it was not within the province of the Court to create substantive constitutional rights to guarantee equal protection of the law.[52] In upholding the Texas scheme for financing its educational program, Justice Powell applied the traditional rationality standard, stating: "A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the state's system be shown to bear some rational relationship to legitimate state purposes."[53]

Justice Marshall, in his dissent, rejected the majority's assertion that

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45. The strict scrutiny standard of equal protection analysis is discussed in Gray, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

46. Casey, *The Supreme Court and the Suspect Class*, 40 EXCEPTIONAL CHILDREN 119 (1973); Wald, *The Right to Education*, 2 LEGAL RIGHTS OF THE MENTALLY HANDICAPPED 833, 836 (1973).

47. Note, *The Education of All Handicapped Children Act of 1975*, 1976 MICH. J.L. REF. 110, 114-15.

48. For discussion of a third constitutional claim, the substantive right to an equal education, see *id.* at 118. This theory has been limited in its application.

49. 347 U.S. at 493.

50. Note, *supra* note 47.

51. 411 U.S. 1 (1973). The *Rodriguez* case concerned issues of tax policy and interdistrict disparities in educational spending.

52. *Id.* at 33.

53. *Id.* at 40.

only rights recognized in the text of the Constitution should be protected through strict scrutiny by the Court.[54] Applying the "sliding scale" analysis, Justice Marshall stated:

> The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.[55]

Citing the Court's characterization of education in *Brown*, Justice Marshall stated that "education directly affects the ability of a child to exercise his First Amendment rights, both as a source and as a receiver of information and ideas, whatever interests he may pursue in life."[56] Justice Marshall accordingly found in his analysis that the Texas scheme violated the equal protection rights of students in economically deprived school districts. The "sliding scale" analysis was endorsed by Justice Brennan who filed a separate dissent.[57]

Although *Rodriguez* did not directly consider the question of exclusion from free public education,[58] the decision was a serious setback after the progress made in *PARC* and *Mills*. Despite *Rodriguez*, however, judicial progress continued to be made toward protecting the educational rights of the handicapped.[59] Distinguishing *Rodriguez* both on its facts and application of law, courts have invalidated educational programs on an equal protection analysis when education was provided to only a portion of the class of mentally retarded or handicapped. In *Nickerson v. Thomson*[60] the plaintiff alleged that the school board had failed to provide an adequate special education program to meet the needs of some categories of physically and mentally handicapped children. Since some handicapped children were receiving adequate educations, the plaintiff contended that there was no rational basis for the classification scheme which thus violated the concept of equal protection of the law. The court

54. *Id.* at 70 (Marshall, J., dissenting). Justice Marshall pointed out that restrictions upon the right to procreate, the right to vote in state elections, and the right to appeal a criminal conviction were subject to searching analysis by the Court although no such guarantees were present in the Constitution. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942); Reynolds v. Sims; 377 U.S. 533 (1964); and Griffin v. Illinois, 351 U.S. 12 (1956).

55. 411 U.S. at 102-03.

56. *Id.* at 112.

57. *Id.* at 62 (Brennan, J., dissenting).

58. The State of Texas had repeatedly stated in its briefs that it assured every child in every school district an adequate education. In apparent reliance on this assertion, the *Rodriguez* Court never reached the question of the handicapped child's access to free public education.

59. Although in *In re* Levy, 38 N.Y.2d 653, 345 N.E.2d 556, 382 N.Y.S.2d 13 (1976), the New York Court of Appeals followed *Rodriguez*, the unique status of the blind and the deaf provided the rationale for upholding different educational programs for the students with those handicaps as compared with different programs for other handicapped students in the same school system.

60. 504 F.2d 813 (7th Cir. 1974).

held that the statutorily-imposed duty to maintain special education facilities required equality of state action under the fourteenth amendment.

In *Fialkowski v. Shapp*[61] multiple handicapped students brought a section 1983[62] action against state officials, claiming that state education programs did not benefit them with an appropriate education as those programs did for less severely handicapped. The court distinguished *Rodriguez* on factual grounds, noting that while *Rodriguez* dealt with inferior education, *Fialkowski* alleged a complete denial of education. The court stated that "it would thus appear not inconsistent with *Rodriguez* to hold that there exists a constitutional right to a certain minimum level of education as opposed to a constitutional right to a particular level of education."[63] The court also accepted the plaintiffs' contention that the class of retarded children was a suspect class as defined in *Rodriguez*: "[A class] saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[64] The court then applied the test of strict judicial scrutiny and concluded that the plaintiffs had stated a claim for relief.

Employing a strange mixture of fundamental interest and equal protection analysis, the court in *Frederick L. v. Thomas*[65] determined that children with learning disabilities made out a claim of discrimination and unequal treatment under section 1983. The plaintiffs alleged that they were being denied public education and training appropriate to their needs while appropriate education was provided for "normal" and "retarded" pupils. Plaintiffs also claimed that they were subjected to unlawful discrimination since some students with learning disabilities were given special instruction and they were not. The district court characterized the right to education as a quasi-fundamental interest.[66] The court found that an intermediate standard of review was appropriate, stating: "We think that the Supreme Court, if presented with the plaintiffs' equal protection claim, would apply the as yet hard to define middle test of equal protection, sometimes referred to as 'strict rationality.' "[67] In its analysis, the court emphasized the tremendous professional problems in developing a program for the class of handicapped persons represented by the plaintiffs whose learning disabilities are often difficult to analyze.[68]

61. 405 F. Supp. 946 (E.D. Pa. 1975).

62. 42 U.S.C. § 1983 (1975).

63. 405 F. Supp. at 958.

64. 411 U.S. at 28 (1973).

65. 408 F. Supp. 832 (E.D. Pa. 1975).

66. *Id.* at 836. The court founded this analysis on the Supreme Court's determination that sex is a quasi-suspect class in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

67. 408 F. Supp. at 836.

68. *Id.*

II. LEGISLATIVELY-IMPOSED RIGHT OF EQUAL EDUCATION FOR THE HANDICAPPED—AN ANSWER TO *Rodriguez*

Although the Supreme Court's decision in *Rodriguez* has been distinguished, the Court's posture has infringed on the right to education for the handicapped and the ease of establishing that such a constitutional right does exist. It therefore became obvious to professionals and lawmakers after *Rodriguez* that judicial decisionmaking was not comprehensive enough and was insufficient to ensure that all handicapped children would be afforded an appropriate public education. To wait until federal district courts in fifty states plus the territories ruled that such education was a constitutional right was, according to many, to wait too long. Legislation was needed as an alternative to the inadequate courtroom response.[69]

Prior to 1971, mandatory education legislation covering all handicapped children existed in only seven states; and in another twenty-six states, legislation covered only certain categories of the handicapped. Education for the mentally retarded was often excluded. Lack of funding, of course, contributed to this result; however, the continuing notion that the mentally retarded could not learn was the major force stalling the necessary legislation.[70] The *PARC* and *Mills* decisions proved to be the impetus that was needed. Subsequent to those court actions many states enacted mandatory legislation for education of the handicapped. Inadequate funding and enforcement efforts, unfortunately, prevented the legislation from achieving its goals.[71] It continued to be recognized, however, that the major legal basis of authority for education had developed as a power of the states, and that it would only be through major revisions of the state education statutes that sweeping changes in the quality of education for the handicapped would occur.[72] The solution was federal legislation mandating that action by the states.

A. *Section 504 of the Rehabilitation Act of 1973*

In 1973, Congress responded to the social and educational dilemma with Section 504 of the Rehabilitation Act.[73] Section 504 is broad civil rights legislation requiring states that accept federal funding for education to adopt and administer educational policy that does not violate equal protection and due process of law. The section provides in part that "no otherwise qualified handicapped individual . . . shall, solely by reason of his handicap be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity

69. THE MENTALLY RETARDED CITIZEN AND THE LAW, *supra* note 14, at 267.

70. Comment, *supra* note 8, at 746.

71. *Id.* at 754.

72. WILSON, *supra* note 13, at 156.

73. Pub. L. No. 93-112, 87 Stat. 355 (codified in scattered sections of 29 U.S.C.).

receiving Federal financial assistance."[74] Section 504 was therefore a piece of proscriptive legislation, which did not mandate any particulars for compliance, and which did not even include direct reference to education.[75] The Department of Health, Education and Welfare [HEW], interpreting section 504 to include education,[76] established affirmative obligations in its push for Public Law No. 94-142.[77]

B. *Public Law No. 94-142*

Public Law No. 94-142, or The Education for All Handicapped Children Act of 1975,[78] was an unprecedented permanent commitment by the federal government that the eight million handicapped children in the United States would receive a free appropriate public education. The states and local educational agencies, to be eligible for federal financial assistance in meeting the direct costs of educating the handicapped, were required to agree to implement elaborate procedural safeguards and guarantees to ensure that a child's education would be appropriate.[79] The parameters of 94-142 were fashioned in part by the *PARC* and *Mills* decisions, especially in the area of due process safeguards. The cases were influential in shifting the drafters' focus away from the institutions and into the regular classroom since each decision had expressed a preference for regular classroom placement (*Mills*) or the least restrictive alternative (*PARC*).[80] Although it was explained at the congressional hearings leading up to the enactment of 94-142 that *PARC* and *Mills* were not firmly grounded in constitutional doctrine,[81] the explanation was virtually ignored. Rather, the supporters of the Act perceived *PARC* and *Mills* and other pending right to education cases[82] as constitutionally guaranteeing an equal education opportunity.[83] It was therefore the sentiment of the lawmakers

74. 29 U.S.C. § 794 (Supp. V 1975) (amended in 1975 to include all types of handicaps).

75. In addition, there were no interpretive regulations promulgated until May 4, 1977.

76. The only U.S. Supreme Court decision to date interpreting the HEW regulation promulgated to supplement § 504 is Southeastern Community College v. Davis, 99 S. Ct. 2361 (1979). The Supreme Court, in a unanimous decision, ruled that educational institutions do not have to lower or substantially modify their standards to admit handicapped persons to comply with § 504 regulations. The Court found nothing in the history or language of § 504 that limits the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program. According to that decision, an "otherwise qualified person" is one who is able to meet all of the program's requirements despite his handicap.

77. Pub. L. No. 94-142, 89 Stat. 773 (codified at 20 U.S.C. §§ 1401-61 (Supp. V 1975) (amending Pub. L. No. 93-380, §§ 611-21, 88 Stat. 579 (1974), which was passed by Congress as an emergency measure rather than wait for the more comprehensive legislation of 94-142).

78. *Id.*

79. Compliance by the states could not be avoided by referring a child to private schools or facilities since the Act's provisions apply regardless of where the child is referred to or placed. *See* Comment, *supra* note 8, at 719.

80. *Id.* at 752.

81. H.R. REP. No. 332, 94th Cong., 1st Sess. (1975).

82. Forty-six right-to-educate cases were completed or pending. Comment, *supra* note 8, at 751.

83. *See* S. REP. No. 168, 94th Congress, 1st Session 6 (1975); H.R. REP. No. 332, 94th Cong., 1st Session 4-3 (1975). Congressional members found it "in the national interest to assist [the] state and

that it was inequitable that the parents of handicapped children should have to continue to seek redress in the courts when the states had a constitutional obligation to implement equal educational opportunities.[84]

Public Law No. 94-142 did not replace section 504 of the Rehabilitation Act of 1973 for purposes of nondiscrimination of the handicapped in public education, but rather added to the Federal government's enforcement arsenal. While section 504 is a broad, all-encompassing civil rights prohibition that has its main impact in the field of employment discrimination, it is still relied on to enforce integration of the handicapped in the educational setting,[85] especially at the local level.[86] The main thrust toward the guarantee of an equal education for the handicapped, however, is concentrated in enforcing and monitoring compliance with 94-142. In May of 1977, HEW promulgated final regulations for section 504 that interpreted the language of 504 as requiring most of the major guarantees contained in 94-142.[87]

1. *The Goals of 94-142*

Congress enacted 94-142 to accomplish four far-reaching goals: (1) to assure that all handicapped children would have available to them a free appropriate public education, with an emphasis on special education and related services designed to meet their unique needs; (2) to assure protection of the rights of the handicapped and their parents; (3) to assist states and localities to provide for the education for all handicapped children; and (4) to evaluate and assure the effectiveness of efforts to educate handicapped children.[88]

The term "handicapped children" as amended by the 1975 Act, includes "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with special learning disabilities who by reason thereof require special education and related services."[89] At the time of enactment, it was estimated that there was a 12.035% prevalence of handicapping conditions among children aged five to seven, which included a 2.3% prevalence of mental

local efforts . . . in order to assume equal protection of the law." Pub. L. No. 94-142, § 3(b)9, 89 Stat. 775, Statement of Findings & Purpose.

84. Comment, *supra* note 8, at 751.

85. The two laws have additional marked contrasts including remedies that are provided.

86. Conversation with Louis Danielson, State Program Implementation Studies Branch, Bureau of Education for the Handicapped, Dept. of Health, Education, and Welfare (April 11, 1979).

87. Comment, *supra* note 8, at 720.

88. DEPT. OF HEW, PROGRESS TOWARD A FREE APPROPRIATE PUBLIC EDUCATION: A REPORT TO CONGRESS ON THE IMPLEMENTATION OF PUBLIC LAW 94-142: THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT 101 (Jan. 1979).

89. 20 U.S.C. § 1401 (Supp. V 1975). The final regulations, 42 Fed. Reg. 42, 474 (1977), further define "mental retardation" as "significantly subaverage general intellectual functioning existing concurrently with deficite [*sic*] in adaptive behavior and manifested during the developmental period, which adversely affect a child's educational performance."

retardation.[90] According to the findings of Congress, of the eight million handicapped children in the United States, more than one-half did not receive appropriate educational services that would enable them to have full equality of opportunity.[91]

Public Law No. 94-142 is a major piece of legislation. The Act and its implementing regulations cover hundreds of pages. It is the purpose of this section of the paper to introduce and discuss the most significant provisions of the Act—those provisions that relate directly to solving the dilemma faced by the Beattie family in 1919. Emphasis will be on the implementation at the classroom level, with special attention to the attitudes and roles of the professionals concerned.

2. *Administration of the Act*

Public Law No. 94-142 requires that each state education agency [SEA] is responsible for administering, monitoring, and evaluating the implementation of the Act and overseeing the efforts of the local educational agencies [LEAs] toward the desired ends. Ultimate responsibility for ensuring implementation at the state level lies with the Bureau of Education for the Handicapped [BEH] within HEW's Office of Education.

Each SEA must file an annual program plan [APP] with BEH, providing detailed explanation of how the funding will be used to achieve the goal of educating the handicapped. Section 616(a) of the Act sets up the Bureau's monitoring of this implementation on the state level. No funding may be awarded unless a completed APP has been received and approved by the Bureau. Only one state, New Mexico, did not submit a plan and is not currently receiving support under 94-142.[92]

The APPs are useful for reporting planning data,[93] but actual progress can be measured only through observation. BEH has therefore established a system of regular site visits to the fifty-eight states and territories to conduct Program Administrative Reviews [PARs]. Thirty different administrative variables are used to evaluate the SEA. The basic purposes of the PARs are first, to evaluate the state's policies, procedures, and practices in light of Federal regulations and the state's APP; and second, to determine the extent to which handicapped children in institutions supported by 94-142 funds are receiving appropriate services.[94]

The Bureau reviews at least one-half of the states and territories each year, with the exception of New York and California, which are visited

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90. *See* H.R. REP. No. 332, 94th Congress, 1st Session 11 (1975).

91. Pub. L. No. 94-142m §§ (b)1, (3), 89 Stat. 774, Statement of Findings & Purpose.

92. DEPT. OF HEW REPORT, *supra* note 88, at 72.

93. The APP is theoretically a very useful planning and reporting tool. In practice, however, BEH has found APP response by SEAs to lack in detail and direction and to be ineffective as a means of evaluation. Conversation with Roger Coates, Management Analysis Center, Washington, D.C. (March 2, 1979).

94. DEPT. OF HEW REPORT, *supra* note 88, at 72.

every year. Visits to LEAs, in addition to the SEA facilities, are a part of the evaluation. When evidence of noncompliance is found, the BEH report to the SEA describes the necessary corrective actions and sets a deadline for compliance. Monitoring is continued until compliance is achieved.

According to the Act, by September 1, 1978, a "free, appropriate public education" had to be available for all handicapped children aged three to eighteen, and by September 1, 1980, all handicapped children of ages three through twenty-one must be accommodated.[95] An agency seeking funds is required to identify, locate, and evaluate all handicapped children within the agency's jurisdiction.[96] This is referred to by the Bureau of Education For the Handicapped as "Childfind." The Act also requires that agencies give first priority to children not yet receiving funds, and second priority to the most severely handicapped within each category who are currently receiving an inadequate education.

3. *Least Restrictive Environment*

Probably the most controversial requirement of the Act is the Least Restrictive Environment (LRE) concept, which mandates that all handicapped children have an "appropriate" education and be placed in the regular classroom with children who are not handicapped, whenever possible.[97] Removal of the handicapped child from the regular classroom should occur only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[98] This section of the Act demonstrates two motivations by Congress: getting handicapped children into the regular educational environments, and making sure that removal occurs only under limited circumstances.

The practice of ensuring the Least Restrictive Environment has come to be known as "mainstreaming." Opponents of the concept argue that mainstreaming is really just "dumping" exceptional children back into the regular classroom without further consideration.[99] Sources at BEH, however, feel that the characterization as "dumping" may be the result of a failure to understand the legislative intent behind the mainstreaming mandate.[100] The concept of Least Restrictive Environment is based on the assumption that every child, handicapped or not, can benefit from a regular education, and that a majority of handicapped children have mild handicapping conditions and can be readily served in regular classrooms when intensive specialized instruction is given for part of the day. It was

95. 20 U.S.C. § 1412(2)B (Supp. V 1975). No provision need be made by these dates for handicapped children age 3 to 5 and 18 to 21 if state law does not so require.

96. 20 U.S.C. § 1412(2)B (Supp. V 1975). There is a similar requirement under the Rehabilitation Act regulations. *See* 42 Fed. Reg. 22,676 (1977) (codified in 45 C.F.R. § 84.32(a)).

97. 20 U.S.C. § 1412(5)B (Supp. V 1975).

98. *Id.*

99. Comment, *supra* note 8, at 722.

100. Conversation with Louis Danielson, *supra* note 86.

also the outgrowth of a commitment to the development of attitudes and procedures that recognize isolation of the handicapped child is also isolation for the "normal" child.[101] The compelling assumption is that it is far more beneficial to the child to keep him in the normal environment than to remove him and struggle to obtain a meaningful and stigma-free re-entry later.[102]

Although the concept of mainstreaming has recently attracted a great deal of attention, it is based on a body of sentiment long expressed both by courts and by state laws.[103] As demonstrated, *Brown v. Board of Education, PARC,* and *Mills* established the proposition that, given two or more alternative educational settings, the handicapped child should be placed in the least drastic or most normal setting appropriate.[104] During the same time period, it was established in *Wyatt v. Stickney*[105] that placement in an institutional residence must be shown to be the least restrictive setting feasible for that individual.

In addition to these court decisions, by 1975 at least twenty states had required placement in the least restrictive manner, either by state laws pertaining to education of the handicapped children or by regulations.[106] Therefore, the principle of Least Restrictive Environment was firmly established before 94-142 was enacted. In fact, local school districts in several states have histories of a decade or more of mainstreaming handicapped children into regular education classes.[107]

What constitutes an "appropriate" educational placement is a matter for local determination. The principle of Least Restrictive Environment requires that the decision be made on an individual basis and not according to generalizations or group labels. The Act does not require that all handicapped children, regardless of the severity of their handicaps, be "mainstreamed" into regular education classes. There was no intent that every handicapped child be placed in the regular classroom.[108] It is anticipated that there will be instances in which particular children should be placed in settings other than the regular classroom. There must,

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101. *Id.*

102. THE MENTALLY RETARDED CITIZEN AND THE LAW, *supra* note 14, at 516.

103. *Id.* at 514.

104. Harrison v. Michigan, 350 F. Supp. 846 (E.D. Mich. 1972), is also instructive on the subject of Least Restrictive Environment. The court in *Harrison*, although dismissing the suit on procedural grounds, noted the need for special education programs and services designed to develop the maximum potential necessary to the education of every handicapped child.

105. 344 F. Supp. 387 (M.D. Ala. 1972).

106. DEPT. OF HEW REPORT, *supra* note 88, at 32.

107. *Id.* at 33.

108. *See* H. R. REP. No. 332, 94th Cong., 1st Sess. 9 (1975):

When it is clear that because of the nature or severity of a child's handicap, the child must be educated in a setting other than the regular class, it is appropriate to implement such a placement. However, the least restrictive environment provision is also designed as a rights provision to protect against indiscriminate placement of a child in a separate facility solely because the child is handicapped and not because special education is needed in that type of setting.

however, be valid supportive reasons for taking that action, and these reasons must be based on the nature or severity of the child's handicap and the child's individual needs for special education and related services.[109]

Public Law No. 94-142's implementing regulations[110] require each public agency to ensure the availability of alternative placements to meet handicapped children's various educational needs. At a minimum, these alternatives must include regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.[111] According to these regulations, the placement decision is to be made by a group of persons who are knowledgeable about the child, the meaning of the evaluation data, and the placement options. There has been a trend toward including both regular and special education teachers and principals in the placement decision. Parents are often invited to attend the meetings, although the Act requires parental participation only in the Individualized Educational Program [IEP] meeting.[112] The 94-142 regulations require that the IEP govern placement decisions, thereby taking into account the child's characteristics and the specific objectives of his or her instructional program. The BEH report to Congress on the first year's implementation of 94-142, however, indicates that as long as the placement decision is clearly *a part* of the individualized program, it is not important whether the IEP came before the placement or vice versa.[113]

Section 121a.552 of the 94-142 regulations specify criteria that should be considered when placing the child. Children should be placed as close to their homes as possible, preferably in those schools they would normally attend. Another criteria is found in section 504 of the Rehabilitation Act of 1973, which states: "it should be stressed that, where a handicapped student is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs. . . ."[114]

As part of the appropriate placement effort, 94-142 requires states to demonstrate that procedures have been established to ensure that the testing and evaluation materials and procedures used are not racially or culturally discriminatory.[115] Therefore, materials and procedures must be provided in the child's native language, and no one evaluative method can be the sole criterion for determining placement. Proof of the need for

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109. DEPT. OF HEW REPORT, *supra* note 88, at 41.

110. 45 C.F.R. § 121a.551 (1978).

111. *See* Gallagher, *The Special Education Contract for Mildly Handicapped Children*, 38 EXCEPTIONAL CHILDREN 527 (1972).

112. *See* text accompanying notes 132-35 *infra*.

113. DEPT. OF HEW REPORT, *supra* note 88, at 42.

114. 45 C.F.R. § 84 (App. Subpt. D, ¶ 24 1978).

115. 20 U.S.C. § 1412(5) (Supp. V. 1975).

safeguards in the evaluation process is found in the *PARC* decision, in which the plaintiffs, alleging that many mentally retarded children were systematically excluded from a public education, won a consent decree that the educational placement of such children must be based on careful evaluation procedures.[116] Studies have also shown that the results of culturally or racially biased tests may result in inappropriate designation of minority children as handicapped.[117] Therefore, the Act includes detailed evaluation provisions including evaluation through a variety of materials, screening and mandatory periodic evaluation.[118]

It is the opinion of both BEH and Council For Exceptional Children officials that the Least Restrictive Environment concept will improve the self image of handicapped children. According to Bureau sources, improved self-worth is often the necessary catalyst toward improved educational achievement and, in this situation, toward ultimate satisfactory assimilation into society as adults.[119]

4. *Due Process Protections*

Perhaps the most critical requirements of 94-142 are its due process safeguards, which place special emphasis on the rights of the handicapped child and his parents or guardians. The Act includes provisions for: (1) notice to parents or guardians of a change in educational placement of the child;[120] (2) the right to a free "impartial due process hearing;"[121] (3) the right to all relevant school records; (4) the right to an independent evaluation;[122] and (5) the right to an appeal to the state education agency, if the initial due process hearing was conducted by the local educational agency, and to a further appeal in either state or federal court.[123] The hearing procedures are of crucial importance to ensure that the least restrictive environment is effectively made available. The parent has an opportunity at the hearing to present complaints about any matter that relates to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.[124] Thus, the parents can help to assure program adequacy.

At the time of the enactment of 94-142, the Council for Exceptional Children estimated that special education legislation in twelve states included due process requirements, and an additional thirteen states had

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116. 334 F. Supp. 1257 (E.D. Pa. 1971).

117. S. TORRES, SPECIAL EDUCATION ADMINISTRATIVE POLICIES MANUAL (Reston, Va. Council for Exceptional Children 1977).

118. DEPT. OF HEW REPORT, *supra* note 88, at 103.

119. Conversation with Louis Danielson, *supra* note 87.

120. 20 U.S.C. § 1415(b)1(c) (Supp. V 1975).

121. *Id.* § 1415(b)2.

122. *Id.* § 1415(b)1(a).

123. *Id.* §§ 1415(c)-(e).

124. *Id.* § 1415(b)1(e).

regulations containing these protections.[125] Today, twenty-three states have passed education legislation that includes due process safeguards, and virtually every state has these types of requirements in its state regulations.[126]

5. *Description of Services Under 94-142*

Special education is defined in the implementing regulations for 94-142 as consisting of "specially designed instruction, at no cost to the parent, to meet the unique needs of a handicapped child, including classroom instruction in physical education, home instruction, and instruction in hospitals and institutions."[127] "Related services" is defined as:

> transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology, audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes.[128]

The term includes parent counseling and training, school health services, and social work services in schools.[129] Implicit in the Act and its regulations is the requirement that a wide array of services should be available to meet the handicapped child's needs; however, the appropriateness of the services will vary greatly according to the individual needs, and not every school will be expected to provide every service.[130]

The most specific of services required by 94-142 is the Individualized Educational Program [IEP].[131] The Act is based on the premise that all handicapped children are entitled to an *appropriate* education—an education geared to their individual needs. That right is perhaps most clearly reflected in the Act's regulations which mandate that an Individualized Education Program must be developed to educate each handicapped child. An IEP is a written statement developed in any meeting by representatives of the Local Education Agency who shall be qualified to provide or supervise the provision of instruction to meet the needs of the teacher, the parent or guardian, and, when appropriate, the child.[132] This Program is to include an indication of the child's present

125. COUNCIL FOR EXCEPTIONAL CHILDREN, STATE POLICY REGARDING DUE PROCESS AND MAINSTREAMING (1974).

126. L. KOTIN, DUE PROCESS IN SPECIAL EDUCATION: LEGAL PERSPECTIVES 12 (1976).

127. 45 C.F.R. § 121a.14 (1978).

128. *Id.* § 121a.13.

129. J. KAKALIK, SERVICES FOR HANDICAPPED YOUTH: A PROGRAM OVERVIEW, SANTA MONICA, CA. (Rand Corp. Rep. No. R1220 1973).

130. One of the most successful approaches to the delivery of services has been the Fail-Save Program developed by Reynolds. This program provides a continuum of services at different levels depending on the severity of a child's condition and integrates these services into the public school system. Reynolds, *A Framework for Considering Some Issues in Special Education*, 28 EXCEPTIONAL CHILDREN 367-70. (1962).

131. 20 U.S.C. § 1414(a) 5 (Supp. V 1975).

132. *Id.* § 1401 (19).

achievement level; a statement of goals and objectives and projected dates of attainment; a statement of the specific services to be provided; appropriate evaluation methods to be implemented on at least an annual basis; and the extent to which the child will participate in regular classrooms.[133] The IEP is intended to reinforce a general trend in education toward individualized instruction by objectives and educational accountability.[134] Participation by the parents is of particular importance since it provides them with the opportunity to judge for themselves whether the school has the capability to provide their children with the services they feel are necessary for appropriate education. Parental approval of the IEP is a dramatic procedural departure in most school districts.[135]

Teacher training is another essential service provided by the mandates of 94-142. Teacher training programs are a necessary tool toward assuring that handicapped children receive special education and related services designed to meet their unique needs. Teacher training opportunities are provided from a variety of sources. Institutions of higher learning have been encouraged to provide special preservice courses that prepare regular education teachers to work with the handicapped, and to upgrade their special education training programs. Toward that end, BEH has supported a series of projects that provide universities an opportunity to develop a range of teacher training alternatives.[136] It is a requirement under the Act that, in developing its plan for the preparation of personnel, the state must ensure that all public and private institutions of higher education, and all other agencies and organizations that have an interest in the preparation of personnel for the education of the handicapped, are given an opportunity to participate in the development, to review, and to annually update the personnel preparation system.[137]

In-service training programs are also essential to the success of implementation and an integral requirement under the Act. In-service training is defined as "any training other than that received by an individual in a full-time program which leads to a degree."[138] In accordance, BEH has revamped the funding program to meet this need.

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133. 45 C.F.R. § 121a.346.

134. Note, *supra* note 47, at 137.

135. EDUCATION TURNKEY SYSTEMS, PRELIMINARY FINDINGS SUMMARY: CASE STUDY OF THE IMPLEMENTATION OF P.L. 94-142 (1978). The significant legal feature of the IEP is that it facilitates the development of judicially-manageable standards. The measurement criteria and performance objectives are defined, thus relieving the courts of the task. It should be noted, however, that failure to comply with a specific IEP is not suitable for class action litigation that has been the hallmark of the struggle against exclusionary practices. *Id.* at 138.

136. DEPT. OF HEW REPORT, *supra* note 88, at 58.

137. *Id.* Concern has been registered by individuals at the implementation levels of BEH that the BEH-university joint effort programs are too programmatic in focus, lacking the necessary emphasis on implementation skills and continual monitoring. It appears that some programs, especially those at the Ph.D. level, may be talking around, rather than dealing with, the problem of educating the handicapped. Conversation with Roger Coates, Management Analysis Center, Washington, D.C. (April 3, 1977).

138. 45 C.F.R. § 121a.382 (1978).

Funding of in-service programs is to be steadily increased and particular emphasis placed on reaching more teachers, especially those in the regular classroom. BEH recognizes that the mandates of 94-142 cannot be met without training opportunities through a variety of sources.[139]

C. *Nationwide Implementation of 94-142: Are the Goals Being Achieved?*

The first compliance date established by 94-142 was September 1, 1978. By that date, according to the Act, a "free, appropriate public education" was to be available for all handicapped children aged three to eighteen. Therefore, 94-142 is actually only one year old, with the implementation year 1978-79 as the only evidence by which to evaluate successes and failures. There are still many questions unanswered, much data unavailable, and many problems to be solved. Of course, the Bureau of Education for the Handicapped does not have all the answers. In fact, it did not even anticipate some of the questions. It is an evolutionary process, with many dedicated professionals at the various helms, both in Washington and around the country. In its first annual report to Congress,[140] BEH reports that the states have displayed impressive activity toward achievement of the goals of 94-142, widespread commitment to those goals, and a genuine attempt to resolve the problems that impede implementation.[141] It is the purpose of this section of the paper to evaluate the data reported by BEH, the states, and other interested groups.

The most immediate and obvious consequences of the implementation of 94-142 are the result of administrative decisions. Within the Local Education Agencies [LEAs], staff communication procedures for development of individualized education programs, placements, assessment, and due process considerations are now more formalized. There is also an increased involvement of school personnel, representing many disciplines, and a greater participation by parents. Response to the Act has affected both regular and special education personnel and has resulted in an identifiable degree of unrest and turf-battling.[142]

Because of significantly expanding screening programs as a response to Childfind mandates, administrative actions have had two major impacts on school systems. First, they have led to the definition of new duties that teachers and other staff members are expected to perform without any appreciable diminution of previous responsibilities and without increased compensation. Second, they have created the necessity for staff to make difficult choices between new and existing duties in the allocation of their

139. DEPT. OF HEW REPORT, *supra* note 88, at 59-61.

140. An annual report to Congress by BEH on the implementation of 94-142 is mandated as a part of HEW's administrative responsibility under that Act. 45 C.F.R. § 121a.750 (1978).

141. DEPT. OF HEW REPORT, *supra* note 89, at 115-16.

142. EDUCATION TURNKEY SYSTEMS, *supra* note 135, at 3, and exhibits 1, 2, 3 & 4 therein.

time and attention.[143] These and other problems will be explored more specifically in the sections following.

1. *Are the Handicapped Being Identified and Served Under 94-142?*

"Childfind" the identification of the intended beneficiaries of the Act, is the logical and essential first step in implementing 94-142. BEH has accordingly made the identification, evaluation, and placement of all handicapped children[144] a matter of first priority, recognizing that until all eligible children are identified and served, the Act cannot achieve the desired goals and objectives. Since funds are allocated on the basis of state counts, the identification process takes on added importance.[145]

BEH statistics indicate that fewer children were served in the school year 1978-79 than had been anticipated. For that school year, the state counts[146] indicate that approximately 3.6 million handicapped children were receiving special education and related services. An additional 200,000-plus handicapped children were counted under a separate Act,[147] bringing the total count of children served to 3.8 million. Those children fall predominately into three categories: speech impaired, learning disabled, and mentally retarded. BEH figures show that approximately four million may be significantly less than the actual number of handicapped children in the five to seventeen year old population. By Bureau estimates, there should be more than five million school-aged handicapped, and from seven to eight million handicapped children in the three to twenty-one year age range.[148]

While more than 55,000 more handicapped children were served during the 1977-78 school year than during 1976-77, and while some states significantly increased the number of children served, the performance of many states remained constant and some of the western states even decreased slightly. Decreases may be attributable to the requirement under 94-142 that all individualized education programs be prepared by October 1, 1977 to be included in the child count.[149] An additional contributing factor may be the differences in identification and assessment procedures among the states.[150] By way of illustration, the proportion of handicapped

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143. EDUCATION TURNKEY SYSTEMS, *supra* note 135.

144. For definition of "handicapped children," see text accompanying note 89 *supra.*

145. DEPT. OF HEW REPORT, *supra* note 88, at 77.

146. The allocation of 94-142 funds has been based on the average of two separate state counts of handicapped children, one made in October and the other in February of the previous school year. Congress recently amended the Act (Pub. L. No. 95-561) so that states will count children served only once each year, *i.e.*, on December 1.

147. Pub. L. No. 89-313, 89 Stat. 1158 (1965).

148. DEPT. OF HEW REPORT, *supra* note 88, at 16.

149. *Id.* at 9.

150. Another reason for the lower than expected Childfind figures may be that states are aware

children served as mentally retarded in California was only .8% of the state's school-aged population, the lowest among all the states. Since 1974, however, California has had a moratorium on intelligence testing as a result of the case of *Larry P. v. Riles.*[151] That case was a challenge to the use of I.Q. tests that determine which students were to be placed in Educable Mentally Retarded [EMR] classes. The district court recently ruled that the practice is invalid on both statutory and constitutional grounds.[152]

Significant variations exist in the percentages reported by State Education Agencies. At opposite ends of the spectrum, Utah reports that 11% of the children served in that state are handicapped and Wisconsin reports less than 5.2%. The figures also show widespread variation in the particular categories of handicapped children being served. The figures for the percentage of children served for mental retardation show that the southeastern states serve the greatest proportions of these children and the western states serve the fewest percentages.[153] The disparity between the BEH estimates and the state counts gives reason to believe that many states are not serving all eligible children.[154] Although there are identifiable reasons why the state counts may be low,[155] "Childfind" is of critical concern, and the Bureau of Education for the Handicapped in its first report to Congress has identified it as the target area for the future implementation of 94-142. That report states:

> *State efforts will need to be increasingly geared toward finding undiagnosed handicapped children already in school.* Though the commitment and energy that has been devoted to implementation is commendable, there may still be over a million handicapped children—most of them struggling in regular classrooms—who have not yet been identified. Over the next two years, the Bureau will strongly encourage states to improve their screening, referral and assessment procedures to assure that *all* handicapped children are identified and provided the services they deserve.[156]

a. *Are Handicapped Children Being Appropriately Served?*

In addition to the numbers of handicapped children being served, the question must be asked whether these children are being *appropriately* served. This inquiry revolves around the implementation of the Individual Educational Program [IEP]. The IEP is the necessary tool for meeting the

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that the identification of new children means that the state must then come up with the necessary matching funds under the Act. Conversation with Louis Danielson, *supra* note 86.

151. 343 F. Supp. 1306 (N.D. Cal. 1972) (preliminary injunction); No. C-71-2270RFP (N.D. Cal. Oct. 16, 1979).

152. No. C-71-2270RFP (N.D. Cal. Oct. 16, 1979).

153. *See* text accompanying notes 150-52 *supra* for a possible contributing factor to the low percentages in the West.

154. DEPT. OF HEW REPORT, *supra* note 88, at 17.

155. In addition to the reasons stated here, see DEPT. OF HEW REPORT, *supra* note 88, at 18-19 for a more thorough discussion.

156. DEPT. OF HEW REPORT, *supra* note 88, at 116 (emphasis added).

needs of the individual child, thereby providing him with a meaningful education. It is the opinion of this commentator[157] that the success of 94-142 will turn on the ability of school personnel to institute effectively the IEP. The task is a difficult one, and the integral feature is the classroom teacher. Forecasting success at this time is at best speculative.

The IEP is the heart of 94-142, for even more important than *where* you teach the child, is *what* you teach the child. Children are communicated with, motivated, taught, and rewarded in a variety of ways. And those are the "normal" children. Add to those "standard variations" any one, two, three, or more of the variety of handicaps that can afflict a child, and the equation for an appropriate education becomes even more complicated. The gnawing question continues to be whether past educational practice indicates that the IEP mandates of 94-142 can, and more importantly will, be met.

The IEP should not be a new conceptual learning tool to the classroom teacher who will be expected to do much of the implementation under 94-142. Most progressive teacher training institutes have been espousing individualized learning for at least a decade. What universities teach and what teachers actually practice, however, are often far different things. Individualizing instruction is hard work for the teacher, both mentally and physically. Finding the right approach for a child is time-consuming, and the recordkeeping and paperwork can be overwhelming. After all, the children are not all on the same page in the same book at the same time. In reality, the children do not need the teacher sometimes, or even most of the time; rather one child or another needs her *all* the time. The scene is definitely far from the traditional classroom where the teacher had time to grade papers while the children "studied their lessons." And yet, as hard as individualized instruction may be on the teacher, its rewards for the child are immeasurable if it is implemented according to a well-planned and well-tailored program. The problem in the past has been that most teachers, even those trained in individualization, have not been willing to take the time necessary to make individualized instruction a successful experience for themselves and, of most importance, for the child. Too often poor programming leads to chaos, and the concept of individualization is abandoned as inappropriate for the regular classroom setting. What then should lead us to believe that the experience will be any different with 94-142 when the child's needs as a handicapped child are added to his needs as an individual child?

A National Education Association study, cited in the BEH report to Congress, reported that teachers using the IEP approach were enthusiastic about it, and many indicated that they were particularly gratified by being able to see the results of their planning and to measure their accomplish-

157. This opinion is based on extensive teaching in public schools through the United States. The commentator has had in-depth experience with individualized instruction, both in individual school system programs and in pilot programs sponsored by the federal government.

ments.[158] The underlying message may be that these teachers have not been accustomed to individualized instruction, which requires that goals be set and implementation and evaluation be accomplished with the individual child in mind. It will indeed be an accomplishment if teachers who have not been familiar with individualizing for the needs of a "normal" child can do an appropriate job for the handicapped child with far more complicated needs.

A recent study found that one of the most common apprehensions felt by teachers regarding the IEP was that the paperwork would consume time and energy formerly used for teaching. The IEP process has placed heavy time demands on teaching staffs, particularly as they attempt to modify existing mechanisms to accomodate the new requirements of 94-142.[159] Again, the implication is that time will be taken away from teaching, when in reality *extra* time must be taken, *e.g.*, time before or after school hours, but *not* time *during* school hours. If time is taken during school hours, there has merely been a trade off of evils and very little is gained from such "individualizing." It is upon the willingness to make these "extra" commitments, and the willingness of school systems to provide "extra" time that the success or failure of the IEP will turn. Unfortunately, history does not make success likely.

Based on the above-noted problems inherent in implementing the IEP mandate, teacher preparation and training are of prime importance. One of the most often mentioned and criticized problems expressed to BEH was the shortage of trained personnel. In addition to the lack of training for regular classroom teachers to implement the IEP, there is a critical need for special education teachers able to serve as resource consultants for training regular personnel, and for special education teachers for severely handicapped children. Fortunately for the future of the program, the National Center for Education Statistics [NCES] reports a steady growth during the past few years in the number of graduates in special education.[160] Presently, however, the supply falls short of the demand for such professionals. In the fall of 1977, according to NCES there was a shortage of approximately 3,300 trained special educators, primarily those specializing in learning disabilities. In addition, that figure is probably unrealistically low since it was based on funded vacancies, and not on the needs for implementation of 94-142 requirements.[161] The needs forecasted by the states indicate that the NCES estimation is very low. If the indicated state needs were aggregated, approximately 65,000 new teachers of special education were needed for the 1978-79 school year. Projecting that need to 1979-80 and calculating in the normal attrition rate, the need could reach

158. DEPT. OF HEW REPORT, *supra* note 88, at 105.

159. EDUCATION TURNKEY SYSTEMS, *supra* note 135.

160. NATIONAL CENTER FOR EDUCATION STATISTICS, CONDITION OF EDUCATION, 162-64 (1978).

161. *Id.* at 163.

85,000. Despite intensive efforts encouraged by HEW, however, only about 20,000 new special education teachers graduate each year.[162] Therefore, the shortage of qualified personnel will continue to be one of the most critical issues facing the successful implementation of 94-142.

b. *Are the Right Children Being Served?*

A second tangential question to whether the handicapped are being identified and served is the inquiry whether the *right* children are being served. This concerns the problem of erroneous classification and labeling of children. Congress expressed its concern during the hearings preceding the enactment of 94-142.[163] Concern has also been registered in recent court action[164] and by education professionals. The precise issue is whether non-handicapped children are being identified as handicapped by current testing procedures. In its report to Congress, BEH does not emphasize concern over improper labeling, but addresses it as a predictable potential ill effect of the assessment process. Taking a "lesser of two evils" approach, the Bureau states: "[I]f primary concern is directed toward preventing the incorrect classification of children as handicapped, many eligible handicapped children may not be identified and served."[165] While this is of course true, by virtue of numbers of children affected alone, erroneous classification and labeling is a real problem and should be a prime concern in the implementation of 94-142. It should not be treated as an obvious by-product of "the system" and relegated to the status of a minor issue in the name of progress. Just as we owe it to the handicapped to accord them an appropriate education, we have at least equal responsibility to "normal" children not to impede their progress by labeling them as handicapped based on inappropriate testing procedures. It would indeed be difficult to convince the parents of a "normal" child who had been incorrectly labeled "mildly mentally retarded" that the years their child spent in a program for the handicapped were not harmful to his expectations. Not much comfort is provided by a "lesser of two evils" approach.

It should be noted that BEH does address the issue of reducing errors in assessment and has commissioned experts to advise the states in assessment procedures.[166] It is, however, the opinion of this commentator that BEH gives the problem less than adequate attention in its report to Congress.

2. *Are the Needs of Handicapped Children Being Met in the Least Restrictive Environment?*

Public Law No. 94-142's Least Restrictive Environment require-

162. DEPT. OF HEW REPORT, *supra* note 88, at 55-56.

163. *See* H.R. REP. No. 332, *supra* note 108.

164. *See* Larry P. v. Riles, No. C-71-2270RFP (N.D. Cal. Oct. 16, 1972); Diana v. California State Bd. of Educ., Civ. No. C-70-37 RFP (N.D. Cal. Feb. 5, 1970); and Steward v. Phillips, Civ. No. 70-1199-F (D. Mass. Feb. 8, 1971).

165. DEPT. OF HEW REPORT, *supra* note 88, at 26.

166. *Id.*

ments posed a formidable challenge to most states. The implementation of this type of placement program necessitated a break from traditional practices. Program Administrative Reviews in the first year of implementation disclosed that only eleven of the twenty-six states visited had adopted placement policies that met the requirements of 94-142.[167] In its report to Congress, however, BEH states that it now appears that each of the state educational agencies will be able to give the assurances required by 94-142's mandate for LRE. The data, according to BEH, support this favorable prediction. Data bear out that the greatest number of handicapped children enrolled in school were placed in regular education classrooms for the majority of the school day; a comparatively small percentage of children were served in separate school facilities or alternative educational settings.[168] This finding was expected since the majority of handicapped children have mild handicapping conditions that can readily be served in the regular classroom setting, if intensive specialized instruction is given for part of the day.[169]

The prognosis for the placement of mentally retarded children in the regular classroom is especially noteworthy. Traditionally, mentally retarded children have been served primarily in separate classrooms if they were classified as mildly or moderately retarded, and in separate facilities if they were classified as severely retarded. In 1976-77, before the mandate of Least Restrictive Environment became effective, separate class placement was the prevailing practice for the mentally retarded. The proportion of mentally retarded children presently placed in the regular classroom, as reported by BEH, is now thirty-nine percent.[170] Hopefully this portends a trend, not only for the mentally retarded, but for all handicapped children whose needs can best be met in the regular classroom. A recent case study indicates a steady increase in the number of resource room placements and in general a rising trend in the implementation of the Least Restrictive Environment requirements.[171]

A caveat is necessary when discussing the implementation of Least Restrictive Environment. It is easy to embrace the concept of "mainstreaming" in a wholesale manner if it is believed that it is the best solution for the most handicapped children. Placement in the Least Restrictive Environment, however, does not mean "mainstreaming" in every case. Some handicapped children cannot benefit from a regular classroom setting because of specific needs and limitations. To place these

167. *Id.* at 33. The data was collected in THE NATIONAL ASSOCIATION OF STAFF DIRECTORS OF SPECIAL EDUCATION, STATE PROFILES IN SPECIAL EDUCATION (1977).

168. 94-142 also emphasizes the integration of handicapped children not only into academic classes but also into nonacademic classes and into extracurricular activities. Adequate data, however, do not yet exist regarding the success of the integration.

169. DEPT. OF HEW REPORT, *supra* note 88, at 34.

170. *Id.* at 36.

171. EDUCATION TURNKEY SYSTEMS, *supra* note 135.

children in the regular setting would be inappropriate mainstreaming. Therefore, as pressure is brought to bear on the states to institute the Least Restrictive Environment concept, there must be an assurance of diligent monitoring by BEH to assure that the state, out of frustration or misconception, is not mainstreaming in a wholesale fashion.[172]

"Mainstreaming" has been the most controversial inclusion of 94-142. It has engendered a great deal of discontent and even hostility in some settings. These reactions are particularly true from parents who feel that their children's needs are being adequately met under present segregated arrangements, and even more particularly true of parents who believe their children need a protective environment. These beliefs lead, in some cases, to disputes between schools and parents and have resulted in due process hearings.[173]

Both the National Education Association[174] and the American Federation of Teachers[175] support the concept of least restrictiveness, but only contingent upon the modifications in class size (teacher-pupil ratio) and the availability of appropriate support services. BEH studies indicate emerging tensions and outright resistance to mainstreaming by some professionals and school districts, particularly in those districts with no previous history of educating the handicapped. Regular classroom teachers register complaints about lack of training in special education and lack of behavior management techniques to use with "problem" handicapped children. Those teachers also contend that the instructional time they must devote to handicapped children will unfairly reduce the instructional time they can devote to nonhandicapped children.[176]

The ideals of 94-142 and the concept of Least Restrictive Environment cannot be abandoned; certainly, at least, not so soon. The regular classroom teacher must still be sympathized with, however, and provided with all possible assistance to make the program work. His or her job in implementing "mainstreaming" is monumental. It would be a monumental task for trained personnel in the overcrowded conditions of most classrooms; it is certain to be an almost overwhelming task for the regular classroom teacher who has had no training in special education. If legislation such as Proposition 13 in California[177] is enacted across the country, effecting the ideals of 94-142 will be less likely as the available tax dollars decrease. Therefore, it is the responsibility of BEH and the state and local school systems to make comprehensive in-service training programs available to teachers. It is not unthinkable that teachers should be offered credits toward postgraduate degrees or credit on the salary

172. *See* H.R. REP. NO. 332, *supra* note 108, for reflection of this concern.
173. DEPT. OF HEW REPORT, *supra* note 88, at 47.
174. NATIONAL EDUCATION ASSOCIATION, MAINSTREAMING (1976).
175. Letter from Albert Shanker to A.F.T. Leaders (Jan. 18, 1977).
176. DEPT. OF HEW REPORT, *supra* note 88, at 44.
177. CAL. CONST. art. XIII (A).

schedules for participation. The teacher is already required to do extra work; therefore increased compensation should not be out of order. Extra free time for the teacher to facilitate the recordkeeping and evaluating tasks should also be considered. In the past, school systems have not been amenable to these requests; their urgency is now greater than ever. The regular classroom teacher must be taught to bear up under the pressures of "mainstreaming," or else the implementation of 94-142, which pivots on the mainstreaming concept, cannot succeed. The support systems provided will prove to be a critical ingredient toward program success.

III. CONCLUSION

The attitude of the public toward education of the handicapped has come a long way since 1919 when the Wisconsin Supreme Court ended Bud Beattie's formal education. Emphasis has shifted over the years, by efforts in the courts and especially by those in the legislatures, and focus is no longer exclusively on the best interests of the "normal" children,[178] but includes the best interests of the handicapped children. It has finally become a recognized goal that these two concerns can be fostered in an integrated system.

Public Law No. 94-142, as the main impetus toward this integration, is yet in its infant stages. Its successes are noteworthy; its shortcomings are a subject of great concern. The major problems facing those implementing the Act are the result of the lack of a trained staff and understaffing. The partial remedy for both is increased funding, and, in light of inflation and tax-cutting, this is no small concern. It may be a positive sign that Congress has recently passed legislation establishing a new cabinet-status Education Department.[179]

In addition to funding, the other necessary ingredient to the success of The Education For All Handicapped Act is desire—desire by legislators to be earnest in follow-up efforts to get their enactment off the report pages and into the classroom; desire by local administrators to commit themselves to an appropriate education for the handicapped; and desire by reluctant parents and classroom teachers to accept a new concept and fight for its survival. Inherent in that fight is the survival of modern day Bud Beatties, most of whom will have neither the fortitude nor the support to prevail as he has.

As interested persons committed to the ideal that all handicapped children are entitled to receive an equal public education, all educators, lawmakers, parents, and citizens must be aware that Philip Roos may be posing the critical question: "Unlike many other animals, man does not abandon his handicapped offspring. Rather he shelters him, hopes for him,

178. The *Beattie* court's decision to exclude the handicapped child from public school education was justified by a best interests test. 169 Wis. at 235, 172 N.W. at 155.

179. Dept of Education Organization Act, P.L. No. 96-88 (signed into law by President Carter on Oct. 17, 1979).

dreams for him, and loves him."[180] But, does man educate his handicapped offspring? Can the hopes and dreams of a handicapped child be realized without an education? The answer to the latter question is emphatically "no," and the answer to the former lies with the successful implementation of Public Law No. 94-142.[181]

180. See note 1 *supra.*

181. The author would like to especially thank Charles Halpering, Institute for Public Representation, Georgetown University Law Center, and Robert Plotkin, Mental Health and Law Project, Washington, D.C., for their enthusiasm and support during the preparation of this article.